

Competing Economic Views of the Constitution

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Almost from its inception, the Constitution enjoyed a measure of prestige and respect unique in world history.¹ This enthusiasm for the Constitution was replaced by immense cynicism upon the publication of Charles Beard's famous and enormously influential² book,

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1. See Kristol, *"The Spirit of '87"*, PUB. INTEREST, Winter 1987, at 3-4. Writes Kristol:

"Veneration" is not too strong a term, at least so far as popular opinion is concerned. . . . This condition has endured almost from the very beginnings of the nation. Though, as we know, the opposition to ratification of the Constitution was widespread and heated, within a decade such sentiments had evaporated. What that distinguished constitutional scholar, E. S. Corwin, has called (contemptuously) a "cult of the Constitution" quickly made its appearance. Such terms as "glorious," even "sacred," became the conventional clichés. . . . When, in 1878, Gladstone made his much-quoted tribute ("the most wonderful work ever struck off at a given time by the brain and purpose of man"), it was immediately accepted as fair and appropriate comment.

Id.

2. See F. McDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* 4 (1958) ("No other work on the making or the nature of the Constitution has been so much debated, so widely known, and ultimately so widely accepted."); see also A. BLOOM, *THE CLOSING OF THE AMERICAN MIND* 29 (1987) ("What began in Charles Beard's Marxism . . . became routine. We are used to hearing the Founders charged with being racists, murderers of Indians, representatives of class interests.").

An Economic Interpretation of the Constitution of the United States,³ which provides the focus for this issue of the *George Washington Law Review*.

Beard's work "came as a revelation to scholars and intellectuals who hailed it for undermining the patriotic banalities of nineteenth-century historiography."⁴ Only recently have we emerged from the "grave doubts and bitter and violent denunciations of our national purpose"⁵ that Beard's constitutional analysis brought upon us.

But, just as the more optimistic approach to our constitutional heritage seemed finally to have reasserted itself, a new and more sophisticated economic interpretation of the Constitution — this time from the law and economics movement — has emerged to challenge the conventional wisdom once again.⁶ In this Article I wish to challenge the view of the law and economics movement that the Constitution serves to facilitate rather than to retard countermajoritarian wealth transfers desired by special interest groups. In challenging the current perspective, however, I wish to affirm the general validity of using economic models to address constitutional theory by employing a standard, neo-classical economic analysis to justify the respect that the Constitution has enjoyed throughout most of its history. Thus, while I believe that the economic approach to constitutional analysis is the right approach, I wish to suggest that proper application of the model generates a far different vision of the Constitution than is currently seen.

The United States Constitution is not only an economic document, it is the first public-regarding economic constitution in world history, and its economic underpinning is the source of its success.⁷ As indicated above, not all of those who have examined the Constitution in economic terms have taken such a benign view of the document. Specifically, a "progressive" or Marxian⁸ strain of economic interpretation, founded on the important early work of Charles

3. C. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913).

4. Diggins, *Power and Authority in American History: The Case of Charles A. Beard and His Critics*, 86 AM. HIST. REV. 701, 702 (1981).

5. Lavine, *John Dewey and the Founders: Human Nature and Politics*, 3 WORKS & DAYS 53, 53 (1985).

6. See, e.g., Crain & Tollison, *The Executive Branch in the Interest-Group Theory of Government*, 8 J. LEGAL STUD. 555 (1979); Crain & Tollison, *Constitutional Change in an Interest-Group Perspective*, 8 J. LEGAL STUD. 165 (1979); Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975).

7. See Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 228 n.29 (1986) (discussing the meaning of "public regarding").

8. I use the term "Marxian" here to refer to those scholars who view historical events (such as the drafting of the American Constitution) as the inevitable consequence of economic factors and class relationships. Apparently, it was not until the 1950s that Beard's work (and that of his followers) generally came to be identified with Marxism. See Diggins, *supra* note 4, at 702 ("Time finally ripened in the 1950s, when Beardianism

Beard, espouses the view that the Constitution structured government to facilitate the retention of wealth by, and the transfer of wealth to, a small minority of men concerned primarily with their immediate property interests.⁹ Despite its glaring errors,¹⁰ Beard's work is important if for no other reason than that it takes a self-consciously *economic* approach to the Constitution. Indeed, the culmination of Beard's thesis is that the Constitution was "an economic document drawn with superb skill by men whose property interests were immediately at stake."¹¹ Although I strongly disagree with Beard's normative conclusions about the nature of the economic outcomes that the Constitution is designed to generate, and I share the skepticism of many about the validity of his historical analysis, his core premises about the features that cause a constitution to be an economic document are precisely the same as mine.

Predictably, those academics applying economic principles to legal problems (i.e., proponents of the law and economics movement) also take a decidedly economic approach to the Constitution.¹² Although the approach to the Constitution taken by those in the law and economics movement is far more sophisticated and rigorous in its use of models than the approach taken by the Marxists, at the core their theories are identical. Like the Marxists, law and economics theorists view the Constitution as a forum for the expression of a political equilibrium among competing, powerful special interest groups. According to the theory, these special interest groups place an especially high value on constitutional rules, because such rules are harder to repeal and therefore more durable than ordinary legislation.¹³

It is worth taking notice when two groups with such starkly divergent views are in agreement about something as important as their view of the Constitution. At the core of both theories lies what I consider to be a peculiar view of the separation of powers. Both

became almost synonymous with Marxism . . ."); see also A. BLOOM, *supra* note 2, at 29, 56 (describing Beard as a Marxist).

If Beard was himself a Marxist, he was a closet Marxist. See Adair, *The Tenth Federalist Revisited*, 8 WM. & MARY Q. 48, 61 (1951); Lerner, *Beard's Economic Interpretation of the Constitution*, in BOOKS THAT CHANGED OUR MINDS 153-54 (M. Cowley & B. Smith eds. 1938). For a self-consciously Marxist analysis of the Constitution, see H. GERSTENBERGER, *ZUR POLITISCHEN ÖKONOMIE DER BÜRGERLICHEN GESELLSCHAFT: DIE HISTORISCHEN BEDINGUNGEN IHRER KONSTITUTION IN DEN USA* (1973).

It is even less accurate to consider Beard a progressive than it is to consider him a Marxist. His work is vastly different than that of such progressives as John Dewey, Oliver Wendell Holmes, and Thorstein Veblen.

9. In Beard's view, the Constitution was enacted because "[l]arge and important groups of economic interests were adversely affected by the system of government under the Articles of Confederation, namely, those of public securities, shipping and manufacturing, money at interest; in short, capital as opposed to land." C. BEARD, *supra* note 3, at 63.

10. See F. McDONALD, *supra* note 2, at 349-57 (finding that key propositions of Beard's economic interpretation are incompatible with the facts).

11. C. BEARD, *supra* note 3, at 188.

12. For a list of the seminal works in the growing movement to apply economic principles to constitutional issues, see *supra* note 6.

13. See Tollison, *Public Choice and Legislation* 14 (manuscript to be published in 74 VA. L. REV. (1988)) (copy on file at the *George Washington Law Review*).

Beard and the economists view the separation of powers, like the system of checks and balances, of which it is a part, as a vehicle designed by the Framers to effectuate interest group domination of daily political life. This, it seems to me, is the central flaw in their analysis. The separation of powers and the system of checks and balances thwart rather than facilitate the political effectiveness of special interest group coalitions.

Thus both sides agree that the Constitution is in fact a profoundly economic document and that the separation of powers is the central feature that causes the Constitution to merit this description. This point seems obvious, but it long has been ignored by constitutional law scholars ignorant of the rudiments of public choice.¹⁴ Disagreement comes over the question of the precise economic function that the separation of powers is supposed to have in the constitutional system. It is here that I part ways with both the Beardians and the current paradigm in the law and economics literature.

As will be seen, a great deal turns on this question. If the Beardians and the law and economics adherents are correct, then the Constitution is an exploitive creation designed to effectuate needless and destructive wealth transfers. If they are right, the Constitution is not a "good thing" and cannot be defended from a normative standpoint. Indeed, their analysis presumably implies that we would all be better off if the Constitution had never been enacted in the first place. In place of their approach to the Constitution, I offer an alternative, also based on economic analysis, which posits that the Constitution is a public-regarding document expressly designed to impede the welfare-reducing wealth transfers described above. Further, the separation of powers is one of the principal mechanisms used by the Constitution to prevent such transfers from taking place. But, like the others who view the Constitution from an economic perspective, I am firmly of the view that economic incentives rather than altruism caused the Constitution to take the shape it has.

In part, the purpose of this Article is to define what it means to discuss a constitution as an economic document. Toward this end, Section I of the Article sets up the rules of the game by articulating the model that drives all economic approaches to constitutional interpretation and shows how the model was embraced by the Framers. Section II describes in more detail the specifics of both the Beardian approach and the law and economics approach to the Constitution. These descriptions should provide a clear image of what it means to think of the Constitution as an economic document.

14. The notable exceptions are Cass Sunstein and Bruce Ackerman. See Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1028-29, 1040-43 (1984); Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1732 (1984).

Finally, after describing what I believe to be the flaws in the existing economic approaches, the last Section of the Article sets forth my own economic interpretation of the Constitution. As will be seen, there is much to be gained by using an economic model to evaluate the Constitution. Indeed, I argue that the Constitution is a profoundly economic document in the most fundamental sense and therefore must be evaluated from an economic perspective. The flaw in the current approaches is not in their use of an economic model, but in their application of that model.

I. The Constitution from an Economic Perspective

To say that the Constitution was written from an economic perspective is saying a lot. It means that the drafters of that document made the same assumptions and used the same basic model as economists. In particular, it means that the Framers made the same three simple but important assumptions about human nature that economists make. These common assumptions make it possible to argue that the Constitution is an economic document.

A. The Assumptions of the Economic Model

The three basic assumptions of the economic model are well known and need only be summarized here: (1) people can be expected to act self-interestedly; (2) when pursuing their own self-interest, people respond to incentives in a predictable fashion; and (3) in pursuing their own self-interest, people, by engaging in voluntary exchange, can benefit not only themselves but society because such voluntary exchange drives resources to their most highly valued uses.¹⁵

The "prevailing opinion" among economists in the late 1700s was that in market transactions "one party profits at the expense of the other."¹⁶ But Adam Smith changed that paradigm by showing that voluntary exchanges by definition benefit both parties to the transaction, because only the prospect of gain provides the necessary incentive to consummate the exchange.

Adam Smith also introduced the notion that self-interested economic actors engaging in consensual, mutually beneficial market transactions are given incentives to produce more and thereby benefit society as a whole. In Smith's view, competition among producers would keep prices low and output high, thus benefiting consumers as well as producers.¹⁷

Smith's classic statement of the principles of economics, *The Wealth of Nations*, was published in 1776 just prior to the Constitutional Convention in Philadelphia. Smith's work provided the view

15. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 3-10 (3d ed. 1986) (discussing the nature of economic reasoning in somewhat more detail).

16. R. MCKENZIE, *ECONOMICS* 8 (1986); see also E.G. WEST, *ADAM SMITH: THE MAN AND HIS WORKS* 15 (1976).

17. See A. SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 381-84 (E. Cannan rev. ed. 1976) (1776).

of human nature that was the guiding vision for the Framers. His ideas exposed the possibilities for structuring a government that allowed the rational self-interest of the citizenry to act like an "invisible hand," through which individual economic actors facilitate the common good by pursuing their own goals.¹⁸

It must be emphasized at the outset that to adopt an economic model for drafting a constitution does not require that the Framers embraced the assumptions that drive the model. The purpose of assumptions in social science methodology is to construct a model that will be useful in predicting real world outcomes.¹⁹ In other words, the value of a model lies not in the accuracy of its assumptions, but in its success in predicting outcomes.²⁰ Thus to say that the Framers employed the economic assumption of self-interestedness does not mean that the Framers were of the view that people place their own, selfish goals above those of the society as a whole in all contexts and situations. Rather, it means simply that the Framers were of the view that they could draft a better constitution by making the assumption that self-interestedness would be the dominant motivating force in human nature often enough so that their failure to embrace the assumption would have disastrous effects on post-constitutional America. In other words, the way to invoke the assumptions of economics to produce a successful constitution is to draft a document that deals with the way that men generally behave rather than the way that men always behave.

B. *The Assumptions of the Framers*

As Martin Diamond has pointed out, the perspectives on and assumptions about constitutional law that informed the Framers find their most complete expression in James Madison's *Federalist No. 10*,²¹ in which Madison addressed the problem of factions.²² Here Madison expressly embraced the notion that what would separate his constitution from those that had gone before it would be a more realistic conception of human nature. This conception of human

18. See R. MCKENZIE, *supra* note 16, at 8-9.

19. See M. FRIEDMAN, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3 (1953).

20. Because the true test of a theory lies in "its utility in predicting or explaining reality," economic theory is clearly a success as a social science. See R. POSNER, *supra* note 15, at 13.

Indeed, the lack of reality in some of the assumptions of economic theory may be a sign of strength rather than weakness. The purpose of assumptions in economic modeling is to simplify a world that is far too complex and confused to be modeled without making such assumptions. For any given level of predictive power, the simpler the assumptions of a model, the better the model. See *id.*

21. See *THE FEDERALIST* No. 10, at 56, 56-57 (J. Madison) (J. Cooke ed. 1961).

22. Diamond, *Ethics and Politics: The American Way*, in *THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC* 39, 48 (R. Horwitz 2d ed. 1979).

nature is precisely the same as the conception of human nature that drives economic theory. From this starting point, the Constitution became an economic document.

The problem confronting the Framers was that, on the one hand, they did not want to organize another monarchy, but on the other hand, the earlier democracies had all been abject failures, nothing less than "spectacles of turbulence and contention."²³ Madison's view was that the problem with previous democracies had lain in the assumptions made by their organizers. Specifically, prior to the Federalists' construction of our political regime, "the whole of political thought had turned on ways to inculcate virtue in a small class that would govern."²⁴ In stark contrast, the government that Madison had in mind (and the one that ultimately emerged) would be based on the assumption that the postconstitutional world would be populated by people motivated by self-interest rather than by virtue.²⁵

The Framers took the view that the only way to work out effective solutions to the problems posed by people pursuing self-interested political solutions to their economic problems was to structure the government so as to channel people's self-interest in socially productive directions.²⁶ Reliance on virtue had been tried in the past and consistently had met with failure. The same incentives that lead people to maximize societal wealth in consensual market transactions lead people, acting through organized special interest groups, to attempt to effectuate wealth transfers through legislation that dramatically reduces overall societal welfare. Recognizing this problem, the Framers attempted to construct a constitutional regime that would direct human endeavor away from the political sphere and towards the domain of private ordering. They accomplished this by raising the transaction costs facing interest groups who attempt to acquire wealth through legislative transfers rather than through consensual market transactions.

Thus the Framers of the Constitution began with the same premise of self-interestedness upon which economic theory is based. Everyone who takes an economic approach to constitutional theory (and many who do not) agrees on this point. There is also general agreement on precisely how this self-interest manifests itself. The disagreement comes in assessing just how the Framers chose to channel that self-interest.

The self-interest of citizens in postconstitutional politics manifests

23. THE FEDERALIST NO. 10, *supra* note 21, at 61.

24. Moynihan, *The "New Science of Politics" and the Old Art of Government*, PUB. INTEREST, Winter 1987, at 22, 23.

25. See Kristol, *supra* note 1, at 3 (stating that the American Constitution "reveals what one would call a 'realistic' view of human nature — i.e., a view that is more alert to the absence of human virtues than to their presence").

26. See Malbin, *Factions and Incentives in Congress*, PUB. INTEREST, Winter 1987, at 91, 92 (stating that "the Framers believed most voters in a liberal democracy would be concerned primarily with their immediate well-being and would try to turn the government toward serving it").

itself in the form of factions or special interest groups whose goal is to effectuate wealth transfers to themselves from the population as a whole. Another distinctive feature of the United States Constitution is that it is the first constitution in world history designed expressly to confront the problems of faction or interest group opportunism.²⁷ Such a recognition was an inevitable implication of the Framers' presumption of self-interestedness and their application of economic reasoning to the task of constitutional creation.

Uniting the Beardians and the proponents of law and economics is their view of how the Framers dealt with the inevitable emergence of factions in postconstitutional political life. Their view is that the Constitution sought to facilitate rather than to impede the success of such groups.²⁸ In my view, however, the Framers intended to raise rather than lower the cost to interest groups of achieving their goals. In so doing, the Framers were able to direct the self-interested behavior of individuals towards the marketplace and away from the political forum.

The Framers attempted to guide transactions away from the political forum and towards the marketplace because the same invisible hand that leads to wealth creation in private market transactions causes massive economic inefficiencies and social instability when it is set loose on the political sphere.²⁹ This difference is due to the crucial distinction between government-induced transactions and market-induced transactions. The element of mutual voluntariness that is present in market transactions is conspicuously absent from transactions (such as taxation and regulation) compelled by the government. As a consequence of the government's ability to coerce, rational, self-interested citizens have incentives to organize into special interest group coalitions in order to demand regulation that makes them better off. And, generally speaking, the regulation that makes them better off does so by transferring the wealth of others to them, rather than by creating new wealth, as in the case of market transactions.³⁰

These wealth transfers take many forms. Government can create cartels of private producers;³¹ it can regulate so as to impose higher

27. See Sunstein, *supra* note 14 *passim*.

28. See *infra* text accompanying notes 40-51 (describing Beard's view); *infra* text accompanying notes 51-92 (describing the law and economics movement's view of the Constitution).

29. See M. OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 36-74 (1982).

30. See Migué, *Controls Versus Subsidies in the Economic Theory of Regulation*, 20 J.L. & ECON. 213, 214 (1977) (stating that "[r]egulation is . . . an instrument of wealth transfer — the extent of which is determined in a political market — where interest groups demand regulation and politician-regulators supply it").

31. See Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3-7 (1971).

costs on one segment of an industry than another;³² or it simply can transfer wealth outright from one group to another through the vehicle of taxation.³³ Successful distributional coalitions are those that are small in relation to the society as a whole and thus are able to overcome the organizational problems that inevitably plague interest group transfer activity.³⁴ As a result, successful politicians are the ones who can identify issues with distinct, readily identifiable winners and diverse, disorganized, hard-to-identify losers.³⁵ Political success comes from enacting laws that transfer wealth from the losers to the winners because doing so provides politicians with net gains in political support.

Because successful distributional coalitions must be small relative to the population as a whole in order to succeed, they are inherently anti-democratic. They are also extremely costly to society in a variety of subtle and not-so-subtle ways. The resources expended in seeking favorable government regulation and avoiding unfavorable government regulation impose a high opportunity cost on society because these are resources that could be allocated to productive uses.³⁶ In addition, once regulations are in place, compliance with them is costly. Finally, regulatory wealth transfer creates allocative inefficiencies by diverting resources to less valuable but unregulated uses.³⁷ It is misleading, however, to think of the problems posed by factions and interest groups as merely economic problems. As Douglass North has observed, the persistent tension between the organizational structure of a government that maximizes the income of its ruler (and his supporters) and an efficient system that reduces transaction costs and encourages economic growth is the "root cause of the failure of societies to experience sustained economic

32. See McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101, 104 (1987).

33. It might seem that all interest groups would prefer wealth transfers to come in the form of direct, lump-sum cash subsidies, but this is not the case. As Professor Stigler has shown, only when the elasticity of supply in an industry or interest group is small will the industry prefer cash to controls over entry or output. This is because cash subsidies must be shared with new entrants to the group or industry and thus quickly will be dissipated by new entry. By contrast, controls over entry or output provide economic rents to an interest group that cannot be competed away by such new entry. See G. STIGLER, *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION* 115 (1975).

34. See M. OLSON, *supra* note 29, at 41-47. The most notable problem facing interest groups is the notorious "free-rider" problem. Interest groups provide a public good for the members of the group. As such, each member of the group is in the same position vis-à-vis the group as an ordinary citizen is vis-à-vis society as a whole. There is little incentive for individual group members to expend resources to obtain wealth transfers when such transfers must be shared by all members of the group. Instead, each group member has an incentive to understate his preference for the good in the hope that others in the group will expend the resources to obtain the good.

35. R. MCCORMICK & R. TOLLISON, *POLITICIANS, LEGISLATION, AND THE ECONOMY: AN INQUIRY INTO THE INTEREST-GROUP THEORY OF GOVERNMENT* 17 (1982).

36. See Alm, *The Welfare Cost of the Underground Economy*, 23 ECON. INQUIRY 243 (1985); Fisher, *The Social Costs of Monopoly and Regulation: Posner Reconsidered*, 93 J. POL. ECON. 410 (1985); Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975); Tullock, *The Welfare Costs of Tariffs, Monopolies and Theft*, 5 W. ECON. J. 224 (1967).

37. McChesney, *supra* note 32, at 118.

growth.”³⁸ Because of its tendency to distort incentives to create wealth, this interest group rent-seeking activity even has been used to explain the decline and collapse of the great civilizations of the West.³⁹

The law and economics proponents, along with Professor Beard and his followers, take the position that the Framers recognized the nature of the interest group problem but nonetheless did nothing to deter the operation of interest groups within the new republic. Rather, both sides maintain that the Framers, for reasons of their own, designed the Constitution so as to *facilitate* interest group activities.

II. *The Current Economic Approaches*

The analysis to this point has led up to the question whether the Framers were attempting to control or facilitate interest group behavior in their construction of the Constitution. The answer to this question lies in an examination of the incentives that the Framers themselves were facing as they convened in Philadelphia in 1776 to devise the new Constitution. The Marxist/progressive approach and the law and economics approach both argue that the Framers were inclined to facilitate interest group activities, presumably because doing so served their own, selfish ends, while designing a constitution that would constrain interest group activity would not.

A. *The Beardian Approach*

The particular special interest groups that Charles Beard argued the Constitution was designed to benefit were capitalist interests, namely those of manufacturers and bankers at the expense of farmers and debtors. According to Beard, the new Constitution conferred four important powers on the new federal government: the power to tax, the power to conduct war, the power to control commerce, and the power to dispose of the western lands.⁴⁰ These powers benefited manufacturers by facilitating the protective tariff; they benefited bankers by blocking “the renewed attempts of ‘desperate debtors’ like Shays’” and by providing for ample revenues for the payment of their claims.⁴¹

In Beard’s view, small farmers were harmed by the Constitution because it established a central government with sufficient power to quash any armed agrarian rebellion against the evil land barons.

38. North, *A Framework for Analyzing the State in Economic History*, 16 *EXPLORATIONS ECON. HIST.* 249, 253 (1979); see also M. OLSON, *supra* note 29, at 19-21.

39. See M. OLSON, *supra* note 29, at 1.

40. C. BEARD, *supra* note 3, at 176.

41. See F. McDONALD, *supra* note 2, at 5 (quoting C. BEARD, *supra* note 3, at 171).

Debtors were harmed because the new Constitution prevented large numbers of debtors from seeking relief from their creditors through the state legislature. Specifically, they were prevented from exerting political pressure on state legislatures to deflate the value of the debtors' outstanding obligations by permitting the repayment of such obligations in worthless paper currency issued by the states. Likewise, the constitutional prohibition forbidding the states from impairing contractual obligations was seen by Beard as a means to benefit creditors at the expense of debtors.⁴²

Thus to Beard the Constitution is a purely economic document in the sense that it reflects the outcome of a concerted struggle for political power among competing interest groups who have organized to advance the narrow economic interests of their members. According to Beard, "[i]n the ratification, it became manifest that the line of cleavage for and against the Constitution was between substantial personal interests on the one hand and the small farming and debtor interests on the other."⁴³ As will be seen, this vision of the Constitution as a forum for competition among discrete economic interests is a simplistic version of the constitutional vision embraced by those interested in law and economics who have turned their attention to constitutional theory.⁴⁴

In Beard's view, the "keystone of the whole structure" of the Constitution was the separation of powers, particularly the establishment of an independent judiciary.⁴⁵ In his words:

If we examine carefully the delicate instrument by which the framers sought to check certain kinds of positive action that might be advocated to the detriment of established and acquired rights, we cannot help marvelling at their skill. Their leading idea was to break up the attacking forces at the starting point: the source of political authority for the several branches of the government. This disintegration of positive action at the source was further facilitated by the differentiation in the terms given to the respective departments of the government.⁴⁶

The power of the third branch, in particular its ability to declare acts of Congress unconstitutional, was seen by Beard as the primary bulwark of the capitalists against encroachment by subsequent legislatures bent on altering the structure of society.⁴⁷

Other aspects of the system of checks and balances, especially the bicameral legislature and the executive veto, also enforce the status quo in Beard's view.⁴⁸ By providing for staggered terms of office (members of the House of Representatives are elected to serve two-year terms, members of the Senate to six-year terms, and the President to four-year terms) the Framers, according to Beard, were able

42. See C. BEARD, *supra* note 3, at 154-79, 290-91, 325.

43. *Id.* at 325.

44. See *infra* text accompanying notes 51-92.

45. C. BEARD, *supra* note 3, at 162.

46. *Id.* at 161.

47. See *id.* at 163-64.

48. See *id.* at 162.

to protect the winners of the constitutional wealth transfer game against future encroachments by democratic processes.⁴⁹ Beard believed that if there were a sudden change in the political climate in the country, that change could not manifest itself in the political sphere for several years due to the staggered nature of the terms of office of the elected representatives. In other words, the separation of powers not only prevented "popular distempers" from "working their havoc through direct elections;" it also imposed "the requirement that they must last six years in order to make their effects felt in the political department of the government, providing they can break through the barriers imposed by the indirect election of the Senate and the President."⁵⁰

Because so much of Beard's important book is devoted to his now largely discredited description of the precise economic interests of the Framers and his reasons for why these interests are relevant, Beard's explanation of the mechanics by which he thought the Constitution furthered those interests easily can be lost. Yet those mechanics are what interest us here. The restrictions against state government interference with contractual obligations, and the structure of the separation of powers, especially the power of the independent judiciary, were seen as the devices through which Beard's self-interested Framers accomplished their economic goals. These features, in Beard's view, made the Constitution a profoundly economic document.

B. The Law and Economics Movement's Approach to the Constitution

Just as Beard regarded the Constitution as the triumph of a small number of special interest groups over the popular will,⁵¹ those law and economics scholars working in this field view the Constitution as the triumph of special interest politics over majoritarian outcomes. And, like Beard, those applying economic principles to legal analysis consider the system of checks and balances in general, and the separation of powers in particular, as the centerpiece of the economic Constitution.

The law and economics approach to the Constitution is at once more sophisticated and more superficial than the Beardian approach. More sophisticated in that it employs formal modeling techniques to study the legislative process and uses empirical analysis to validate its hypotheses. More superficial in that it does not

49. *Id.*

50. *Id.*

51. To use Bruce Ackerman's colorful phraseology, "[i]n Beard's familiar view, the Framers' masquerade in the name of the 'People' is nothing but a bad joke." Ackerman, *supra* note 14, at 1015.

attempt, as Beard did, to describe fully the precise nature of the economic incentives facing the Framers.

Where Beard simply looked at the economic self-interest of the Framers as a source of information about their incentives, the economists, applying microeconomic principles, view the lawmaking process as a market in which legal rules go to the individual or group that values them the most, as measured by its willingness and ability to pay.⁵² The currency used for payment comes in the form of political support for politicians, bureaucrats, and other political actors who "essentially act like brokers in a private context — they pair demanders and suppliers of legislation."⁵³

The key difference between the market for legislation and other markets is that the legislatively coerced suppliers of interest group bargains generally are unwilling (and often unknowing) participants in the process. Organized interest groups that successfully mount lobbying campaigns to obtain passage of statutes that transfer wealth from the populace as a whole (or from other, less politically powerful groups) make up the demand function in the economic theory of legislation. The individuals and groups who provide the funding for these statutes are the suppliers, with legislators serving as brokers between the groups. But unlike suppliers of goods and services in market transactions, the suppliers of interest group legislation do not receive anything in exchange for what they are legislatively required to supply. Instead, they are coerced to supply legislation because of their inability to mount successful opposition to the groups that are making the demands on the political brokers.

Successful brokers (politicians) "establish an equilibrium" by "efficiently pairing [these] demanders and suppliers of legislation."⁵⁴ If too much or too little law is passed, it becomes efficient for some groups to organize into effective political coalitions to remove the politician/brokers and replace them with ones better able to maximize political support.⁵⁵

An important and often overlooked aspect of the economic theory of regulation holds that politicians do not pander to the demands of effectively organized special interest groups merely because their ideologies or personal value judgments favor such groups. Rather, satisfying the demands of these groups is a matter of Darwinian political survival. If a politician is not able to satisfy such demands, he or she will be replaced by one who can.

Thus the premise that politicians pander to interest groups is in fact a mere tautology under the economic theory of regulation (at least as it applies to democracies), because the politician who musters the most political support inevitably triumphs in the democratic process; the economic theory of regulation simply observes that politicians who do not rationally maximize political support will be re-

52. See R. POSNER, *supra* note 15, at 496-99.

53. Tollison, *supra* note 13, at 8.

54. *Id.* at 9.

55. *Id.*

placed. Politicians who ignore the preferences of interest groups that demand regulations in order to pursue their own conception of the public interest will be unsuccessful in competition against rival politicians who maximize political support.⁵⁶

Thus the process of political support maximization in the economic theory of legislation is exactly analogous to the process of profit maximization by private firms in microeconomic theory. Just as those firms that pursue goals other than profit maximization are weeded out, so too are those politicians who pursue goals besides political support maximization.

Another important aspect of being a successful politician is political entrepreneurship. According to the economic theory of regulation, being a successful political entrepreneur requires a politician to do two things that are wholly inconsistent with the older, public-interest theory of regulation. The first is to seek out issues that benefit small, well-organized groups at the expense of disorganized, ill-informed voters.⁵⁷ The second facet of political entrepreneurship involves actively seeking to identify policy issues that stand to benefit currently *unorganized* groups of individuals and then organizing such groups into effective political coalitions that in turn can provide political support to the politician. Pairing new-found issues with previously unorganized groups who stand to benefit from such issues permits politicians to ward off fermenting opposition by more creative challengers.

The foregoing discussion has been a wholly uncontroversial description of the economic theory of legislation as it applies to the ordinary, day-to-day political activities of a democracy. The theory has found virtually universal support among economists interested in the operation of the political process.⁵⁸ The theory has been

56. Several recent articles have disputed this aspect of the economic theory of regulation by arguing that the personal ideology of the politician, rather than the interests of well-organized special interest group constituents, can affect the voting behavior of elected officials. See Kalt & Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279 (1984); Kau & Rubin, *Self Interest, Ideology, and Logrolling in Congressional Voting*, 22 J. L. & ECON. 365 (1979). But see Peltzman, *An Economic Interpretation of the History of Congressional Voting in the Twentieth Century*, 75 AM. ECON. REV. 656 (1985) (arguing that ideological influences, when properly measured, exert a negligible effect on politician voting).

57. See R. McCORMICK & R. TOLLISON, *supra* note 35, at 17 (stating that "political brokers" have incentives to search for issues that result in legislation in which well-organized groups "gain transfers at the expense of the general public"). Often, a group will organize to provide a private service to its members and later find that political action becomes a "cost-effective by-product" of the group's regular activities because the "start-up costs" of organizing the group have already been borne. Tollison, *supra* note 13, at 6; see also Moore, *The Purpose of Licensing*, 4 J.L. & ECON. 93 (1961) (arguing that existing interest groups can raise money for lobbying by pricing their services monopolistically).

58. See Kalt & Zupan, *supra* note 56, at 279.

formalized elegantly⁵⁹ and subjected to rigorous empirical testing.⁶⁰

Although the economic theory of regulation uses a more complex model than the one developed by Beard, the differences between the two approaches are surprisingly small. The distinctions lie only in the details of the way that the model of regulation is applied: the models themselves are fundamentally the same.

Beard, like the economists currently writing about the regulatory process, developed a model of the political process in which the economic interests of dominant special interest group coalitions would be reflected in the law of the land. Beard erred, according to the dictates of this model, not in his conception of the dominance of interest groups on the political landscape, but in his understanding of the precise nature of the interest group dynamic he was attempting to model.

Beard erroneously thought, for example, that agricultural interests were being stamped out by the new Constitution. But even the most casual observers of the current political scene recognize that, far from being stamped out, agricultural interests have organized into a myriad of successful interest groups that have achieved massive wealth transfers for themselves.⁶¹ It is hard to imagine how an

59. The economic theory of regulation is based on the early seminal work in public choice. See K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951); A. DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957); W. RIKER, *THE THEORY OF POLITICAL COALITIONS* (1962); Tullock, *Problems of Majority Voting*, 67 J. POL. ECON. 571 (1959). The classic work bridging the intellectual gulf between economics and public choice was James Buchanan and Gordon Tullock's, *The Calculus of Consent* (1962), the enormously important book that provides the intellectual underpinnings of the economic theory of regulation.

Other important theoretical work includes M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); M. OLSON, *supra* note 29; and W. NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971).

The first major piece to apply formal economic theory to regulation was Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971), which formalized the idea that regulation is actively sought by certain industry groups as a means of acquiring a competitive advantage over rivals, which, in turn, leads to profits above the competitive rate. This model contrasted sharply with earlier work that viewed regulation solely as a source of costs rather than benefits to the regulated group. These costs were justified as necessary to protect and benefit "the public at large." *Id.* at 3. Other major contributions to the economic theory of regulation have been Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983); Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); and Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974).

60. See R. MCCORMICK & R. TOLLISON, *supra* note 35; Bartel & Thomas, *Direct and Indirect Effects of Regulation: A New Look at OSHA's Impact*, 28 J.L. & ECON. 1 (1985); Coase, *Payola in Radio and Television Broadcasting*, 22 J.L. & ECON. 269 (1979); Marvel, *Factory Regulation: A Reinterpretation of Early English Experience*, 20 J.L. & ECON. 379 (1977); Moore, *The Purpose of Licensing*, 4 J.L. & ECON. 93 (1961); Pashigian, *The Effect of Environmental Regulation on Optimal Plant Size and Factor Shares*, 27 J.L. & ECON. 1 (1984); Shughart & Tollison, *On the Growth of Government and the Political Economy of Legislation*, 9 RES. L. & ECON. 111 (1986); Weingast & Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983).

61. See Kilborn, *Plotting a Global Attack Against Farm Subsidies*, N.Y. Times, July 12, 1987, § 4, at 2, col. 3 (describing massive government subsidies totalling \$25 billion to all segments of the agriculture industry, including dairy farmers, grain farmers, cotton farmers, and manufacturers of oilseeds, honey, sugar, tobacco, wool, fruits, and vegetables). Representative Daniel Glickman, a member of the House Committee on Agricul-

industry that receives government subsidies comprising \$25 billion (15 percent of the nation's current annual budget deficit) can be said to be exploited or disenfranchised.⁶² The economic theory of regulation, by invoking a much better understanding of the underlying interest group dynamic, corrects Beard's erroneous application of the interest group model as it applies to agricultural interests.⁶³

Beard also erroneously concluded that capitalist banking and creditor interests inevitably will win out in the political marketplace. The ability of debtors to seek relief under the insolvency laws, consumer legislation such as truth-in-lending laws, and the Fair Credit Reporting Act strongly suggest that Beard was also wrong in his notion that the market for regulation inevitably favors the bankers. And the recent struggles of commercial and investment bankers to undo the shackles of the Glass-Steagall Act also support the notion that Beard's model of the regulatory market was far too simplistic.

But one key facet of Beard's model remains untouched by the modern economic theory of regulation, and that is the way that the Constitution fits into these economic theories. Both sides view the Constitution as "just another set of rules" that reflect interest group pressures to the same extent as other laws. The only difference between the constitutional rules and the garden-variety legal rules lies in the former's durability, which makes them more valuable to special interest groups. According to the economic view of constitutions, "[c]onstitutional provisions are worth more than normal legislation to interest groups because they are more durable (i.e., harder to repeal), but they are also more costly to obtain because of stricter procedures required for passage."⁶⁴

In addition, both economic approaches to the Constitution view the separation of powers as the cornerstone of the interest group bargains that the Constitution is said to represent. Beard's view of the separation of powers was that it slowed the pace of progressive change and stifled the political expression of the popular will.⁶⁵ The law and economics movement views the separation of powers as a mechanism for solving the problem of postcontractual opportunism by legislators.⁶⁶

ture, has estimated that abandoning all government subsidies to the agricultural industry would cause the United States to lose 15% of its farmers. *Id.*

62. *See id.*

63. *See* Posner, *supra* note 59, at 347 (showing how "economic theory can thus be used to explain why we so often observe protective legislation in areas like agriculture").

64. Tollison, *supra* note 13, at 14.

65. *See supra* text accompanying notes 44-50.

66. Postcontractual opportunism refers to the problem of contracting parties receiving the benefits of a contractual bargain in one period and then having an incentive to renege on the deal or to alter the terms of performance to make them more favorable to themselves.

The economists recognize that "[p]erhaps the most basic issue related to the demand for legislation is to explain why laws persist over time. That is, why is the work of one legislature not overturned by the next legislature?"⁶⁷ The problem they see is that interest groups will be unwilling to provide political support in exchange for favorable legislation if those laws can be repealed in the very next session.⁶⁸ Viewed from an *ex ante* perspective, the prospect of having a legislature alter the terms of an interest group political deal will reduce the political support that interest groups will be willing to offer in exchange for favorable legislation. Thus legislators who are interested in maximizing the political support they receive from constituents have an incentive to construct a system that allows them to make credible, binding promises to interest groups seeking legislation.⁶⁹

An important series of economic articles identifies the separation of powers as the means of solving the dilemma facing political-support-maximizing legislators.⁷⁰ Specifically, Crain and Tollison look at the executive veto and conclude that it increases the durability of special interest legislation.⁷¹ Like Beard, Crain and Tollison view the executive veto as a means of making it more difficult to repeal a law once it is enacted.⁷² They also argue that the executive veto raises the cost of repealing a law by more than it costs to pass a law in the first place.⁷³ This of course increases the durability of the statutes benefiting interest groups and thereby increases the value of legislation to such groups.⁷⁴

The other facet of the separation of powers relevant for our purposes is the independent judiciary. William Landes and Richard Posner have written an extremely influential article in which they argue that the independent judiciary also serves to increase the

67. Tollison, *supra* note 13, at 8.

68. See Landes & Posner, *supra* note 6, at 877 (stating that "congressional bad faith of this sort [i.e., altering interest group bargains after political support has been received] would reduce the present value of legislative protection to interest groups in the future, and hence the enacting Congressmen's welfare").

69. "The price that a winning special-interest group would bid would depend to a large extent on how durable their legislative protection is expected to be." Crain & Tollison, *The Executive Branch in the Interest-Group Theory of Government*, *supra* note 6, at 558.

70. See *supra* note 6.

71. See Crain & Tollison, *The Executive Branch in the Interest-Group Theory of Government*, *supra* note 6, at 560.

72. *Id.* The executive veto, according to Crain and Tollison, raises the cost of repealing a law. Laws that are harder to repeal are more durable. The problem with this analysis, of course, is that the executive veto makes laws harder to pass in the first place for the same reason that it makes them harder to repeal later on. In both cases there is a nontrivial probability that the President will veto the legislative enactment.

Unless there is some reason (Crain and Tollison offer none) why it is more likely that the President will veto a repeal of a law than an initial enactment, Crain and Tollison's own analysis suggests that the executive veto raises rather than lowers the cost to an interest group of achieving legislation favorable to itself.

73. *Id.*

74. "Given a rational pattern of investment in the durability-enhancing aspects of democratic decision making, the executive veto, along with the constitutive rules of the legislature and the independent judiciary, acts to increase the durability of special-interest legislation." *Id.*

durability of special interest legislation.⁷⁵ The Landes and Posner argument is, as the authors themselves admit, highly counterintuitive.⁷⁶ Their argument is that, despite the fact that the existence of an independent judiciary seems to be designed to thwart the operation of interest groups,⁷⁷ "at a deeper level the independent judiciary is not only consistent with, but essential to, the interest-group theory of government"⁷⁸ because it prevents special interest group bargains from being thwarted by subsequent legislatures:

The element of stability or continuity necessary to enable interest-group politics to operate in the legislative arena is supplied, in the first instance, by the procedural rules of the legislature, and in the second instance by the existence of an independent judiciary.⁷⁹

Like Crain and Tollison, Landes and Posner argue that the costs to interest groups of the separation of powers (namely that the separation makes it harder for interest groups to achieve the initial passage of legislation that is favorable to them) is outweighed by the gains, which come in the form of increased durability.⁸⁰

Taken together, the Landes/Posner and Crain/Tollison articles

75. See Landes & Posner, *supra* note 6.

76. They write:

The existence of an independent judiciary seems inconsistent with — in fact profoundly threatening to — a political system in which public policy emerges from the struggle of interest groups to redistribute the wealth of the society in their favor, the view of the political process that underlies much of the recent economic work . . . on the political system. The outcomes of the [interest group] struggle can readily be nullified by unsympathetic judges — and why should judges be sympathetic to a process that simply ratifies political power rather than expresses principle?

Id. at 876.

77. See THE FEDERALIST NO. 78 (A. Hamilton).

78. Landes & Posner, *supra* note 6, at 877.

79. *Id.* at 878.

For many individual Congressmen . . . especially those who did not expect to remain in Congress for long, the benefits from repudiating a previous Congress' "deal" might outweigh the costs. And even if the good faith of the majority of Congressmen were assured, it would be insufficient to guarantee legislative stability in any case where the initial vote enacting the legislation was not one sided. If the [initial] vote was close, the defection of only a few Congressmen, as a result of retirement or defeat at the polls, from the winning coalition might lead to a repeal in the next session of Congress, since the newly elected Congressmen would have no commitments to honor the "deals" of their predecessors.

Id.

80. *Id.* at 878-79:

The impediments to legislation have the effect of endowing legislation, once it is enacted, with a measure of durability. The result is to increase the value of and hence the demand for legislation. . . . [U]nder plausible assumptions the increase in the value of legislation will exceed the increase in its cost, since a modest increase in the cost of enacting legislation could multiply many-fold the length of the period in which the legislation was expected to remain in force.

Id.

present a unified picture of the current economic approach to the Constitution's separation of powers.⁸¹ As Crain and Tollison themselves observe, this vision of the Constitution "in effect undermines any semblance of a separation-of-powers argument in favor of our tripartite system of government. If our approach and that of Landes and Posner is correct, we have not a separation but a collusion of powers in our governmental system."⁸²

At the core of the economic approach to the separation of powers is the idea that interest group legislation inevitably will be unsuccessful in the absence of checks and balances that serve to ensure the durability of such legislation.⁸³ This idea, however, is based on the erroneous assumption that there are no repeated dealings between the interest groups seeking wealth transfers and the politicians who procure the supply.⁸⁴ If there is the practical equivalence of simultaneity of performance in the form of repeat dealings, then the durability of special interest deals is ensured because legislators have an incentive to keep their end of the deal in order to obtain political support from interest groups in the future.

Thus if politicians want interest group support they must continue to support such groups. The current economic approaches to the Constitution are flawed because they envision a world in which political support to legislators from political coalitions is needed only in advance of political action by legislators. But this premise conflicts with a core premise of the economic theory of regulation, which posits that interest group bargains are brokered by politicians who must maximize political support from interest groups in order to win reelection.⁸⁵ Absent a continuing need to maximize political support, the model has no theory to predict why lawmakers do anything.

If politicians are seeking reelection, then interest groups will be assured that the statutes that have been passed to benefit them will not be repealed. If such statutes are repealed, then the interest groups will withdraw their political support from those politicians who voted for the repeal. The persistent need for political support by elected officials seeking reelection is sufficient to ensure the future performance of interest group political bargains. There is no need for outside enforcement through such costly devices as an independent judiciary where there is simultaneity of performance between interest groups and politicians.⁸⁶ Put another way, politicians generally support statutes because interest groups are promising to

81. Indeed, the purpose of the article by Crain and Tollison, which followed the paper by Landes and Posner, was to complete "the task that Landes and Posner started." Crain & Tollison, *The Executive Branch in the Interest-Group Theory of Government*, *supra* note 6, at 561.

82. *Id.*

83. Landes & Posner, *supra* note 6, at 877 (stating that "the independent judiciary is not only consistent with, but essential to, the interest-group theory of government").

84. *See id.* at 879.

85. *See supra* text accompanying notes 54-56.

86. *See* Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 527 (1981).

support them in their future political campaigns. From this perspective the problem is not preventing the politician from reneging on his bargain with the interest group, but rather ensuring that the interest group will not renege on the politician.

Relations between politicians and interest groups are characterized by a pattern of repeat dealings; politicians expect to strike future bargains with interest groups. This provides a strong disincentive for politicians to renege on past political deals. The value of their future promises is diminished if they do not honor past agreements.

A further reason why politicians do not renege on their deals, which again has nothing to do with the presence of an independent judiciary or the existence of an executive veto, is that over time politicians develop a reservoir of human capital in their reputations for behaving in certain ways. A politician's reputation as a "liberal" or a "conservative" is a reputational bond that serves to bind him to his promises to honor his agreements. If reneging on a deal with an interest group would cost a politician more in loss of reputational capital than he stands to gain from a postcontractual breach, he can be counted on not to renege.

Finally, it must be stressed that, all else being equal, politicians will prefer to write self-enforcing contracts because interest groups will adjust the level of political support according to the expected costs of enforcing the legislation they procure. If a group believes costly litigation is required to obtain the benefits of a legislative bargain, it will reduce the price it is willing to pay for such legislation accordingly.

Thus, contrary to the Landes/Posner and Crain/Tollison view, the presence of such elements of the system of checks and balances as the separation of powers, the executive veto, and the independent judiciary are not "essential to" the interest group theory of government.⁸⁷ Several other contracting mechanisms exist to ensure the durability of interest group legislation.

The current economic view of the separation of powers has an additional flaw: it does not explain why presidents and judges have any rational *incentive* to act as the enforcers of the contracts between special interest groups and legislators. According to the theory, the executive and the judiciary receive no pecuniary gain from enforcing these agreements — a particularly bizarre premise in light of the fact that the executive, like members of Congress, has a strong incentive to maximize his own political support. It is impossible to imagine why the President does not extract additional political support for himself from interest groups with a national base in ex-

87. See *supra* note 83.

change for his agreement to decline to veto a particular statute. And if the executive does extract political support from interest groups (as the economic theory of regulation predicts he must),⁸⁸ then the presence of the executive veto as part of the separation of powers *raises* rather than lowers the cost to interest groups of achieving passage of favorable legislation.

The role played by the independent judiciary is even more curious. Federal judges have life tenure, and their salaries cannot be reduced during their terms of office. They are insulated from the political incentives that cause politicians to maximize political support. As such, it is difficult to predict the nature of the incentives to which judges are likely to respond. In light of the fact that Article III judges cannot affect their wealth by deciding cases in particular ways or by favoring certain groups, it seems plausible that some judges will decide cases so as to maximize their prestige with certain constituents, such as liberals, conservatives, or academics. Other judges will care little for prestige and simply maximize their leisure time. Still other judges will decide cases so as to impose their own values — their own personal vision of the good — upon society. Judges simply have no incentive to substitute the enforcement of a set of bargains between interest groups and legislators for their own set of preferences regarding the outcome of a case.

As I have explained elsewhere, the ability of judges to thwart the bargains struck between interest groups and Congress appears to be highly inconsistent with the interest group theory of government.⁸⁹ The cost to interest groups of having a system of checks and balances, combined with the simultaneity of performance between those demanding interest group bargains and those supplying them, inevitably leads one to the conclusion that the current economic paradigm is wrong and that the separation of powers impedes rather than facilitates interest group rent-seeking activity.

In sum, the heart of both the Beardian approach and the law and economics approach is that the Constitution is an economic document designed to facilitate the transfer of wealth from the populace at large to discrete, well-organized special interest groups. Both models of the Constitution reflect the standard economic premise

88. See *supra* text accompanying note 56.

89. See Macey, *supra* note 7. The most obvious method for courts to thwart an interest group's political deal with Congress is to declare the statute that reflects the interest group's half of the deal unconstitutional. But there are myriad other ways for an independent judiciary to thwart such deals. The Supreme Court might simply decline to grant certiorari in cases where lower courts have abrogated interest group bargains. In addition, courts at all levels can thwart interest group bargains intentionally and unintentionally by misconstruing the relevant statute.

Such "creative" interpretation of statutes by courts has an effect on the levels of political support that interest groups are willing to offer to politicians. As the probability of a particular law being declared unconstitutional or misconstrued increases, the value of that law to political coalitions declines proportionately. This decline in value quickly will be reflected in a decline in the willingness of interest groups to pay for such legislation. The fact that creative judicial interpretations are roundly criticized by congressmen of all political stripes provides evidence that it has an effect on levels of political support from interest groups.

that the Framers were self-interested individuals rationally responding to economic incentives by pursuing their own, selfish goals as opposed to worrying about the general welfare of the country. And, again reflecting standard economic analysis, the pursuit of one's self-interest to attain economic goals outside of the market, where consent is required in order for transactions to take place, led to a Constitution designed to facilitate pernicious wealth transfers, rather than to facilitate the economic stability conducive to wealth creation.

These twin economic visions of the Constitution contrast sharply with the dominant vision of that document within the rest of American intellectual life. Starting with Gordon Wood,⁹⁰ the prevailing vision of the Constitution has been that it is a "political device designed to control the social forces the Revolution had released."⁹¹ And, as Cass Sunstein has observed, the prohibition of the distribution of resources to powerful, economic special interests is "the most promising candidate for a unitary theory of the Constitution."⁹² The question addressed in the next and final section of this Article is whether these widely held, public-regarding — but noneconomic — visions of the Constitution can be reconciled with the principles of economic theory.

III. *An Alternative Economic Approach to the Constitution*

Clearly, rent seeking is widespread in ordinary political life. Indeed, the interest group model of political behavior, as it was described above, is an incredibly robust model for predicting both the behavior of politicians and bureaucrats and the outcomes generated by the political process. But merely because we observe rent-seeking behavior by politicians and interest groups during ordinary political life does not mean that the Constitution was designed to promote this sort of transfer activity.⁹³ Interest group transfer activity is an inevitable by-product of rational, self-interested behavior in a democracy. It is not possible even to reduce much less eliminate the

90. G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 393-476 (1969).

91. *Id.* at 476.

92. Sunstein, *supra* note 14, at 1732. Obviously, the Framers themselves stated that their objective was to ensure against the capture of government by interest groups bent on effecting unprincipled wealth redistributions. See *THE FEDERALIST* NOS. 10 (J. Madison), 51 (J. Madison) & 78 (A. Hamilton); see also D. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 5-7, 94-110 (1984) (examining the causes, effects, and control of factions discussed by Madison); G. WILLS, *EXPLAINING AMERICA: THE FEDERALIST* 80-86, 210-15 (1981) (discussing Madison's concerns with the problems presented by factions). But there is no reason to believe the Framers should be taken at their word when they say that they designed the Constitution to benefit the new Republic rather than themselves.

93. See Macey, *supra* note 7, at 245-46.

incidence of such activity without cost. Resources can be rationally expended to reduce wealth transfers only up to the point at which the benefit from the reduction in transfers equals the cost of achieving the reduction.⁹⁴ Thus the fact that we observe wealth transfers does not dispose of the question whether the Constitution, as an economic document, was designed to facilitate or to impede such transfers.⁹⁵ To answer this question we must examine the economic incentives facing constitutional drafters.

The existing economic visions of the Constitution reflect the belief that the Framers wanted to benefit themselves by consolidating political power in a new central government that in turn would be able to protect their interests (Beard's view) or to effectuate wealth transfers in order to garner political support for themselves (Crain/Tollison and Landes/Posner's view).

Both of these arguments make the erroneous presumption that in constitutional politics, interest groups will prefer a system of government that promotes wealth-transfer activity. At the outset, it is important to note the difference between constitutions and ordinary statutes. Unlike ordinary legislation, constitutions do not effectuate isolated wealth transfers from one group to another. Rather, constitutions, in establishing the structure of government, establish the procedures that interest groups must follow in order to obtain passage of the laws they favor. The nature of these procedures determines the level of transaction costs that interest groups face when attempting to achieve passage of a law. The higher the level of transaction costs at the constitutional level, the more costly it is for an interest group coalition to obtain favorable legislation.

To put the point in slightly more formal terms, as the structural rules of a constitution change, the supply curve of legislation shifts. These structural rules include the size of the legislature, the presence or absence of a bicameral legislature, the existence of an independent judiciary, the length of legislative sessions, the rules regarding politicians' ability to succeed themselves, and the nature of the constituents of the various elected officials, among others.⁹⁶ As passing statutes becomes more costly, the supply curve moves towards the origin, reflecting the fact that at every level of political support, interest groups receive less legislation.⁹⁷

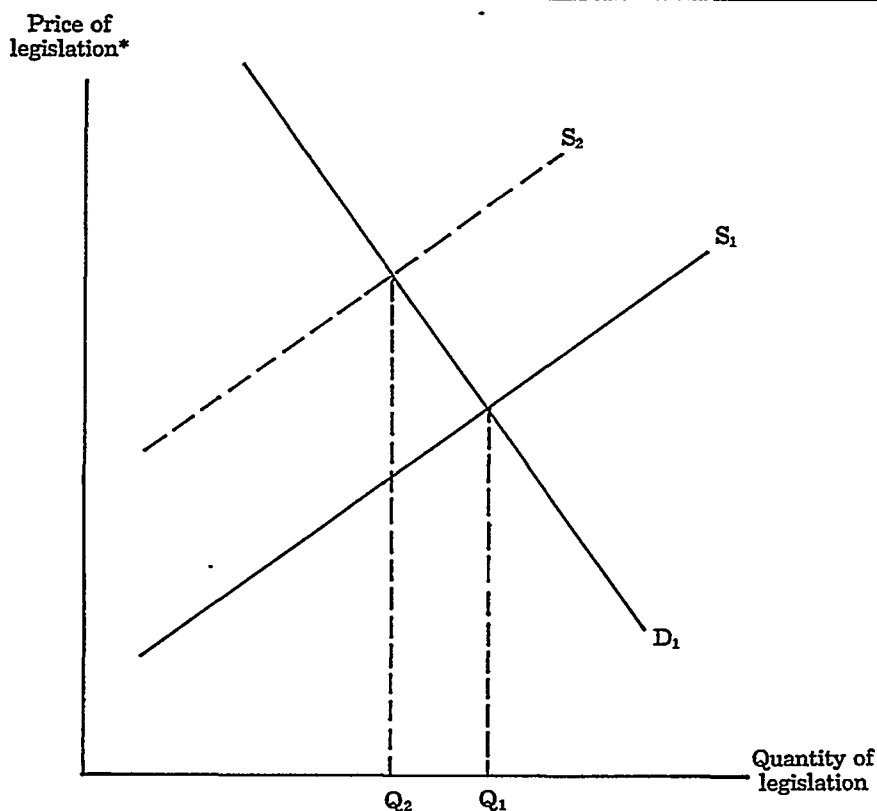
94. *See id.* at 246.

95. *Id.*

96. *See id.* at 247-48 (describing some of these structural rules and explaining how they raise the costs to interest group coalitions of obtaining legislation); *see also* J. BUCHANAN & G. TULLOCK, *supra* note 59, at 43, 233-48 (same); R. MCCORMICK & R. TOLLISON, *supra* note 35, at 45-57 (same).

97. *See* Tollison, *supra* note 13, at 8. For example, if a nation with a unicameral legislature amends its constitution to provide for a bicameral legislature, with a house and a senate of differing sizes, the supply curve for legislation will shift inward towards the origin, reflecting the fact that legislation has become more costly to obtain. *See* Macey, *supra* note 7, at 247-48; *see also* J. BUCHANAN & G. TULLOCK, *supra* note 59, at 43, 233-48 (analyzing how a bicameral legislature operates in the context of collective decision-making and how this impacts on the cost analysis of special interest groups); R. MCCORMICK & R. TOLLISON, *supra* note 35, at 45-57 (discussing how the size and ratio of the respective legislative houses affect costs to interest groups).

The crucial distinction between constitutional rules and ordinary legal rules seems to have been lost on the economists who have evaluated the Constitution. This distinction is crucial because it alters the incentives facing special interest groups during times of constitutional creation. Special interest groups that have an incentive to press for specific wealth transfers for themselves also have an incentive to expend resources to avoid wealth transfers from themselves to other groups. Unfortunately, in ordinary political life, free-rider problems prevent coalitions of individual special interest groups from banding together to prevent other groups from obtaining wealth transfers for themselves. Since most groups expect to be net losers from a pervasive system of special interest group activities, these groups have a strong incentive to enact constitu-



*Measured by level of political support needed for passage of a statute.

The supply curve labeled S_1 reflects the political support maximization equilibrium for the nation with the unicameral legislature. The shift to supply curve S_2 reflects the lower level of regulation that comes when the country shifts to a bicameral legislative system. A lower level of output of interest group legislation comes from this constitutional change because each house effectively can veto the act of the other house, thus raising the level of political support necessary to achieve enactment of any given law.

tional rules that raise the costs of rent seeking generally — even if doing so means forgoing a certain measure of favorable legislation later on. The costs of giving up this favorable legislation are outweighed by the benefits of being protected from the expense of paying for the wealth transfers that go to others.

Although a small number of groups will expect to be net winners from the wealth transfers that will take place in Congress after a new constitution is enacted, such groups will not necessarily oppose constitutional rules that inhibit rent seeking. Because rent seeking by interest groups is a negative-sum game,⁹⁸ gains from trade between future providers of political favors and future recipients of such favors exist at the time of constitutional creation.

A simple example illustrates the point. Suppose a particular group (group "X") thinks that it will receive a total of \$1,000 in wealth transfers if Constitution A is adopted, but only \$250 if Constitution B is adopted. This interest group will find it advantageous to support Constitution B if it receives any sum above \$750 for doing so. Because other groups recognize that the additional \$750 in wealth transfers under Constitution A will cost them more than \$750, and group X recognizes that it will have to incur costs in the future to obtain the additional \$750, there will be gains from trade between these groups that provide them with incentives to adopt Constitution B, which inhibits rent seeking.

Thus the current presumption of the Beardians and the Crain/Tollison and Landes/Posner school that interest groups inevitably have an incentive to support constitutions that promote rent seeking is erroneous. In fact, the opposite appears to be true. Groups and individuals who expect to be net losers in the wealth transfer game have incentives to strike bargains — which will be reflected in constitutional rules — in which they agree to refrain from rent seeking in exchange for promises from other groups that they, too, will refrain from rent seeking. And groups that expect to be net winners in the wealth transfer game have incentives to give up the right to seek future transfers in exchange for immediate wealth transfers that permit all groups to share in the gains that accrue from halting the dead-weight societal losses that come from rent seeking.

By ignoring the gains that result from contracting among interest groups at the time of constitutional creation, the current economic approaches to the Constitution fail to recognize the economic incentives that can make constitutions different from other forms of

98. Rent seeking is a negative-sum game as opposed to a simple wealth transfer because the costs of obtaining favorable legislation are positive. Such costs include the costs of organizing into effective political coalitions, the costs of providing political support to sympathetic politicians, the costs of providing political support to the opponents of unsympathetic politicians, the costs of imposing sanctions on noncooperative group members, the costs of complying with regulations, and the opportunity costs of having resources diverted to less valuable, but unregulated, uses. See McChesney, *supra* note 32, at 118. See generally, Posner, *supra* note 36; Rogerson, *The Social Costs of Monopoly and Regulation: A Game Theoretic Analysis*, 13 BELL J. ECON. 391 (1982); Tullock, *supra* note 36.

law. These approaches also underestimate the possibilities of constitutional ordering. But merely because the various parties involved in the process of constitutional creation recognize that they stand to gain by drafting a constitution that impedes rent seeking does not mean that they will be successful in drafting such a constitution. Just as various groups have an incentive to draft a constitution that impedes rent seeking, such groups also have incentives to breach the agreement by seeking wealth transfers after the constitution is enacted.

In other words, after the constitution has been enacted, all of the individuals and interest groups within a society are in a classic prisoner's dilemma in relation to one another.⁹⁹ Although everybody would be better off if an enforceable agreement to constrain rent seeking could be achieved, individual interest groups can make themselves better off if they engage in rent seeking, provided of course that nobody else does. Thus the dominant strategy after a constitution has been created is to engage in rent seeking. This allows an interest group to avoid the worst possible outcome (which occurs if all other groups engage in rent seeking and it does not) while leaving open the possibility that it will enjoy the best possible outcome (which occurs if all other groups in society refrain from rent seeking except that group).

In order to mitigate the effects of the prisoner's dilemma, the various interest groups participating in the creation of the constitution must be able to draft a document that prevents such postconstitutional opportunism from taking place. Mere promises are not enough. The world is replete with constitutions (those in South America and the Soviet Union are obvious examples) that contain

99. Game theorists use the term "prisoner's dilemma" to describe situations in which the inability of individuals to coordinate their decisions leads to a suboptimal result, when viewed from the decisionmaker's perspective.

The term arises from a game-theoretic analysis of the decisional problems facing two prisoners who are the subject of separate interrogations for committing a crime together. Each prisoner knows that if neither confesses or informs on his copartner, each will go free or enjoy a significantly reduced sentence. However, if one prisoner confesses to the crime and the other does not, the authorities will impose a particularly severe sentence on the prisoner who declined to confess and a particularly light sentence on the prisoner who "squealed." If both confess, both will be punished, but less severely than if only one prisoner confessed. The incentive for the rational actor is to confess on the hope that the other prisoner will refuse to confess. But since both prisoners will be motivated to act this way, they will end up with an outcome that is worse for both than if they had been able to coordinate their actions by making a binding *ex ante* agreement between themselves to decline to confess. The model is designed to show that rational, self-interested behavior at the individual level can lead to irrational outcomes at the group level. See THE DICTIONARY OF MODERN ECONOMICS 352 (rev. ed. 1983).

For a more formal description of the prisoner's-dilemma game, see P. SAMUELSON & W. NORDHAUS, ECONOMICS app. 556-57 (12th ed. 1985); P. ARANSON, AMERICAN GOVERNMENT: STRATEGY AND CHOICE 56-58 (1981).

myriad promises to individuals and groups that seemingly protect them from incursions by government. Such documents have not provided any discernible protection. By contrast, as Buchanan and Tullock have shown in their classic book, *The Calculus of Consent*, different organizational structures inevitably lead to different supply curves for legislation.¹⁰⁰

These structural rules constitute the basis for a credible constitutional method of constraining rent seeking. Indeed, the structure of the United States Constitution indicates that the document was designed to impede the flow of legislative output to interest groups. The bicameral legislature, the executive veto, and the independent judiciary all are designed to impede rather than facilitate rent seeking by interest groups.¹⁰¹

Thus far, two necessary preconditions for a public-regarding constitution have been identified. The first is that the relevant interest groups be aware of the costs and benefits of postconstitutional rent seeking so that they have an incentive to design a constitution that impedes such behavior by interest groups. The second precondition is that the interest groups have the technical ability to prepare a constitution that minimizes the costs associated with the prisoner's dilemma that faces the citizenry of the postconstitutional world.

The final precondition for the creation of a constitution that impedes rather than facilitates rent seeking is the existence of a political climate where the preferences of the polity (precondition one) and their constitutional technology (precondition two) can find expression. This third condition requires that those groups within the population as a whole who have a possibility of being net losers in the wealth transfer game be included in the process of constitutional formation. Future losers must be included in the creation of the new constitution in order to ensure that the interests of those people with incentives to block future wealth transfers find political expression. Obviously, if such groups are not included in the political process, then regardless of how high their stakes are in the outcome or how sophisticated their contracting mechanisms, their interests will not be reflected in the constitution.

These three preconditions to the adoption of a publicly interested constitution — high stakes, sufficiently sophisticated contracting technology, and the inclusion of losing coalitions in the process of constitutional formation — were all present during the formation of the American Constitution. The stakes were high because the Framers were not merely creating a document that would change the rules of the game for an already existing political infrastructure, as is the case with the vast majority of world constitutions.¹⁰² In America the ratification of the new Constitution created an entirely new fed-

100. J. BUCHANAN & G. TULLOCK, *supra* note 59, at 119-262.

101. See Macey, *supra* note 7, at 247-50.

102. The French Revolution, for example, did not create a new nation; it merely reconstituted the old one.

eral republic, largely in order to provide an alternative to the system of state charters and constitutions that existed before 1787.

As a general matter, citizens will have little incentive to inform themselves of the nature of the various statutes passed in the ordinary course of a legislative session because the cost of such legislation is lower than the cost of acquiring such information. And even if the costs of acquiring information about a proposed statute are low relative to the effects of the statute, the cost of organizing an effective political coalition to oppose such a statute is sufficiently high that expending resources to discover the economic effects of ordinary laws remains irrational for ordinary citizens. This cost-benefit calculus changes dramatically when constitutional rules are being considered, because the impact of constitutional rules is much higher than the impact of ordinary laws. Such rules will determine the ability of government to affect all of a citizen's present and future wealth. As McCormick and Tollison have observed:

[W]e would expect the citizen-consumer-taxpayer to play a larger role in constitutional processes than in normal political processes . . . [because] the individual voter's stake is . . . larger when considering constitutional issues. At the relevant margins of behavior, then, we expect more voter impact on constitutions than on regular elections.¹⁰³

Thus, the first precondition for the creation of a public-regarding constitution seems to have been in place at the time of the creation of the American Constitution. The next two preconditions laid the groundwork for the American Constitution to take its unique place in world history.¹⁰⁴

The contracting expertise that enabled the Framers to construct a document that could, at least to some extent, satisfy the second precondition came from two sources. First, the various state constitutions, which "foreshadowed . . . the basic premises of the Constitution,"¹⁰⁵ served as veritable laboratories where alternative constitutional formulations could be tried out. Ineffective contractual provisions were discarded and useful ones were incorporated into the new Constitution. Indeed, as Gordon Wood has observed, the dismal experiences of many state legislatures in controlling the pernicious effects of interest groups was one of the motivating forces for the creation of a federal constitution.¹⁰⁶

In addition to this information about the efficacy of the various state constitutions, the Framers had available John Adams's classic work, *A Defence of the Constitutions of Government of the United States of*

103. R. McCORMICK & R. TOLLISON, *supra* note 35, at 127.

104. *See supra* note 1.

105. *See* Kristol, *supra* note 1, at 6.

106. *See* G. WOOD, *supra* note 90, at 273-82.

America, which is nothing less than an annotated analysis of the operation of all of the various republics that existed throughout world history. This resource also provided valuable data to the Framers about the desirability of various constitutional formulations.

Perhaps more important than even this wealth of practical information, the Framers, for the first time in world history, had the teachings of "[t]he new political science, based on such constitutionalists as Locke, Hume, and Montesquieu"¹⁰⁷ at their disposal. These thinkers were the intellectual inspiration for the Framers. Their views are reflected throughout the *Federalist* papers and in the Constitution itself. Also important was their idea that human virtue could not be relied upon to guide a republic because both the politicians and the polity could be expected to put their own self-interest above the interests of the greater good. In addition, the justifications for the separation of powers that provide the structural underpinnings of the Constitution "find their most complete expression in Montesquieu."¹⁰⁸ But perhaps most important are the twin ideas that a community can improve its lot by constraining itself through the device of the social contract and that the state can serve the people best by specifying and enforcing a set of property rights so as to maximize societal output.¹⁰⁹

The contributions of these social philosophers, as well as of the thinkings of such men as Adam Smith¹¹⁰ and Thomas Hobbes,¹¹¹ provided the Framers with the expertise necessary to construct a constitution that could mitigate the effects of the prisoner's dilemma facing citizens in the postconstitutional world.¹¹² These protections

107. Mansfield, *Constitutional Government: The Soul of Modern Democracy*, PUB. INTEREST, Winter 1987, at 53, 57.

108. Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 2 (1982).

109. See Berns, *The New Pursuit of Happiness*, PUB. INTEREST, Winter 1987, at 65. Writes Berns:

From Locke, "America's philosopher," as he used to be called, the Framers learned how to channel the passions and energies of men into safe activities. . . . [T]he government that secures the right to pursue happiness will be the one that, to the extent possible, leaves men alone to do what they are inclined to do. And according to Locke, they are *naturally* and primarily inclined to seek the "conveniences and comforts of Life."

Id. at 73.

According to Locke, this inclination to seek the conveniences and comforts of life is derived from man's strongest innate desire — the desire for self-preservation. It is this innate desire that obliges government to protect the right to acquire property in order to obtain these conveniences and comforts. See *id.*

110. See *id.* at 72 (describing Smith as the "immediate source" of the *Federalist's* notion that the goal of providing for "[t]he prosperity of commerce . . . is now perceived and acknowledged by all enlightened statesmen to be the most useful as well as the most productive source of national wealth, and has accordingly become a primary object of their political cares'" (quoting THE FEDERALIST No. 12, at 73, 73 (A. Hamilton) (J. Cooke ed. 1961))).

111. See *id.* at 68-69 (stating that "it was Hobbes who first began to speak of the rights of man and, by doing so, changed the terms of American political discourse").

112. The nature of the contracting devices is of course a subject worthy of a discussion of its own. See Macey, *supra* note 7, at 247-50 (describing how the structure of the Constitution supports the conclusion that the document is designed "to favor the general polity over special interest groups"); see also Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*

come not in the form of empty assurances and precatory language but in the organizational structure of the government that the document creates.¹¹³

The third precondition to successful constitutional formation is that those who are likely to be the losers in future rent-seeking activities be included in the process of constitutional formation. As discussed above, the wealth transfers generated by the political process are likely to come from widely dispersed and unorganized individuals. In turn, these transfers are likely to be directed towards small, discrete, well-organized interest groups. As such, for the final precondition to be satisfied, it is necessary for the widely dispersed, unorganized groups and individuals within society to become interested and engaged in the process of constitutional formation.

In the United States experience, the goal of getting the disorganized general population to become engaged in the process of constitutional formation was achieved by requiring that the new Constitution "be submitted to *the people themselves*" and recognizing that "the disapprobation of this supreme authority would destroy it for ever."¹¹⁴ Since there was a realistic doubt about the desirability of a new national government, this submission to the people was not an empty gesture. Indeed, the *Federalist* papers themselves were written for the express purpose of persuading the general public (particularly the crucial New York ratifying convention) to vote for the Constitution.¹¹⁵

Thus, to use Douglass North's terminology, at the time of the ratification debates, the governmental vision that the Framers were attempting to advance faced real competition. The existence of this rival governmental framework was a source of power to those in possession of the franchise at the time of ratification.¹¹⁶ It permitted them to consider and select — in the presence of a realistic alternative — the governmental framework that was best for them. The high stakes ensured that they would have an incentive to invest the resources necessary to acquire sufficient information to make a rational selection. Thus the economic theory of the Constitution that I am presenting does not posit that the Constitution is perfect, only

(manuscript to be published in 74 VA. L. REV. (1988)) (copy on file at the *George Washington Law Review*) (describing structural improvements that could be made on the constitutional provisions that impede interests groups, rent-seeking activities).

113. See Macey, Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory, *supra* note 112.

114. THE FEDERALIST No. 40, at 253, 258, 265-66 (J. Madison) (J. Cooke ed. 1961).

115. Lavine, *supra* note 5, at 53-54.

116. North, *supra* note 38, at 255 ("Where there are no close substitutes, an existing ruler will be characterized as a despot, a dictator, or an absolute monarch. The closer the substitutes, the fewer degrees of freedom the ruler possesses, and the greater the percentage of incremental income that will be retained by the constituents.").

that it was better than the available alternatives on the basis of the political science technology existing at the time.

Conclusion

The purpose of this paper has been to show that it is useful to look at the creation of the American Constitution from an economic perspective, and that a dispassionate view of its creation need not end inevitably in the dour conclusions currently manifested in the literature. Indeed, the current economic approaches, by failing to fully understand the incentives facing the Framers, have generated an economic theory of the Constitution that leads to fundamental misunderstandings of the nature and purposes of that document.

I wish to emphasize that the purpose of this exercise has not been to show that constitutional rules *inevitably* will be more public-regarding than ordinary rules. Rather, it has been to show that under certain preconditions the potential for social and economic progress through constitutional creation are enormous. And the available evidence indicates that these preconditions were obtained during the time of the creation of the American Constitution.

The approach taken in this Article has been explicitly economic in the sense that the Constitution itself is explicitly economic. The analysis here has proceeded on the assumption that the significance of the Constitution stems not from the inherent goodness and virtue of the drafters of that document, but rather from the nature of the incentives that guided their actions and those of the "conventions of the people" responsible for its ratification.